

Potential Impact of TPP on Tobacco Control

I. Potential Economic Loss

a. Market Access and Increased Consumption

- The World Bank estimated that opening of Asian Markets to US increased smoking rates to 10%.ⁱ
- Multilateral, regional and bilateral trade agreements have greatly contributed to the increase in tobacco consumption.ⁱⁱ

b. Economic Losses

- The increased global trade could mean substantial additional health costs to treat tobacco-related diseases and a significantly lowered productivity rate for those suffering such diseases, which in turn leads to productivity losses.

II. Potential Regulatory Chillⁱⁱⁱ

1. Tobacco Industry: Investor State Disputes and Threats

- The transnational tobacco business enterprise, Philip Morris, has filed against Uruguay¹ and Australia.²
- In 2005, UNCTAD estimates that the average legal costs incurred by Governments are \$1 to \$2 million, including lawyers' fees;^{iv} The legal cost shelled out by a developing country a protracted investor-state dispute went as high as \$56 million.^v
- Legislation requiring larger pictorial warnings up to 75% in Brunei is in its final stages of approval. This could place it alongside other countries that have the size of graphic health warnings on tobacco product packages such as Australia, Canada, and Mauritius.^{vi} It also announced its intention to consider plain packaging.^{vii}
- All TPP parties with the exception of Brunei, have relatively high levels of commitment in investment. Brunei has so far concluded BITs only with China, Germany, India, Korea, Oman, South Africa^{viii} and it could be a challenge for a tobacco transnational to file a claim in Brunei.
- The TPP could remove this protection altogether and expose Brunei to the same risk its neighboring countries face.

¹ On the other hand, in the Notice of Claim in *PM vs Uruguay*, PM claims that the legislations requiring “single presentation”¹ (effectively a ban on misleading descriptors) and graphic health warnings (up to 80% of the package) are a violation of an investor’s “reasonable expectations” and fair and equitable treatment because it unduly restricts the use of its trademarks,¹ contrary to the Switzerland-Uruguay BIT.¹ Philip Morris also claims that this resulted in a decrease in sales and hence sought compensation for loss of revenue and profit.¹

² In its submission, Philip Morris Asia (*PM Asia*) argued that the mandatory plain packaging² of cigarettes is tantamount to “expropriation” on the use of valuable intellectual property rights, that the measure will not be “fair and equitable” given the dearth of evidence that plain packaging will achieve its intended public health objectives and that the legislation constitutes unreasonable impairment to the investments, a failure to afford full protection and security. Furthermore, it alleged that as a result of the said contraventions under the HK Aus BIT, PM is entitled to cessation of the said legislation and/ or award of damages amounting to billions of dollars.²

2. Threats to Existing Tobacco Control Measures

With the exception of US, all TPP Parties are parties to the WHO Framework Convention on Tobacco Control (FCTC).^{ix} At the earliest opportunity, the tobacco industry frames as trade arguments their objections to tobacco control measures although these are consistent with the FCTC. Such trade arguments that find their way into international trade committees (TBT TRIPS) and even actual international trade/investment disputes (WTO, EFTA, ICSID)

a. Trademark Protection

- In relation to graphic health warning legislation and ban on misleading descriptors, the tobacco industry claims that the use of its trademark is “unjustifiably encumbered by special requirements...in a manner detrimental to its capability to distinguish the goods.. from others..,” in violation of TRIPS^x Art 20.
- These arguments as weak and misplaced since the tobacco companies assert the “right to use a trademark,” whereas the right provided by IP laws are the right to register and the right to not allow others to use the trademark (negative right).
- However, the TPP could also provide the tobacco industry a new way to enforce its intellectual property rights. The idea of making an investment in technological and human resource requirement to comply with TPP provisions, with clear recognition that this will benefit the tobacco industry, is diametrically opposed to the principle that the tobacco industry must not be given any incentives to run its business.^{xi}

b. TBT

- Claims of violation of Article 2.2^{xii} of the TBT (“more trade restrictive than necessary”) in response to product regulation measures are expected to increase as countries begin to provide clear measures on regulating tobacco product innovations and design features, with the guidance of the Guidelines on Implementing Article 9 of the FCTC.
- Countries including the US which produce burley tobacco, has raised concerns with the TBT Committee claiming that “these additives are an essential component of “blended cigarettes” reducing the strong flavour of Burley tobacco and does not add a characteristic flavor.”
- With the TPP, these arguments could become stronger grounds for investor state disputes

3. Potential Threats to Future Tobacco Control Measures/ Trends

a. Curbing Illicit Trade

- Measures intended to curb illicit trade that affects the product or packaging characteristics such as customs markings could easily be challenged as being inconsistent with the TBT (more trade restrictive than necessary to achieve the legitimate objective).
- Future regulatory measures that are intended to curb illicit trade of tobacco such as special licensing procedures and measures to ensure monitoring of transactions,^{xiii} records,^{xiv} and payments^{xv} (e.g. by requiring local presence), or disallowing new-entrants to establish presence in free trade zones,^{xvi} could be viewed by the tobacco industry as a violation of the TPP.

- As Parties negotiate a protocol to eliminating illicit tobacco trade, they should not allow new trade agreements to limit their capacity and authority to regulate and impose stringent measures on tobacco products which are highly susceptible to smuggling.

b. Ban on Point of Sale Advertising and other forms of advertising

- Innovative forms such as SMS promotion, lottery, concerts, retailer incentives and venue design affect the service sector. Liberalizing trade in services without taking exception to services relating to promotion or marketing of tobacco through the TPP could create de-regularized environment that provides the tobacco industry new opportunities to exploit.
- Of particular note is Brunei, which has, among the TPP countries, the least commitments on trade in services. Brunei's tobacco control efforts could be undermined if it will not be able to strictly regulate its service sector with a view to prohibiting tobacco advertising and sale and enforcing such a policy through preventive measures such as requiring local presence.

c. Product Regulation

- Article 10 of the FCTC mandates Parties to adopt measures for public disclosure about the toxic constituents of tobacco products and emissions they may produce. In contrast, patent protection under the TRIPS Agreement requires states to protect manufacturer's "trade secrets."

III. TPP and FCTC

Although the FCTC does not bar Parties from entering into agreements that may cover tobacco products, the FCTC requires that these be "compatible with their obligations under the Convention and its protocols."

WHO FCTC, Article 2.2. "The provisions of the Convention and its protocols shall in no way affect the right of Parties to enter into bilateral or multilateral agreements, including regional or subregional agreements, on issues relevant or additional to the Convention and its protocols, **provided that such agreements are compatible with their obligations under the Convention** and its protocols. The Parties concerned shall communicate such agreements to the Conference of the Parties through the Secretariat.

In order to avoid potential conflict with the FCTC as well as to ensure its freedom to enact tobacco control measures to protect public health, FCTC Parties could seek to completely **carve-out of tobacco from the trade agreement** in the same way that military products, arms, narcotics/drugs, and hazardous wastes are expressly excluded from such agreements.

ⁱ PRABHAT JHA & FRANK CHALOUKKA, WORLD BANK, CURBING THE EPIDEMIC: GOVERNMENTS AND THE ECONOMICS OF TOBACCO CONTROL (1999) – Estimating that opening of Asian Markets to US increased smoking rates to 10%; Allyn Taylor *et al.*, *The Impact of Trade Liberalization on Tobacco Consumption*, in PRABHAT JHA & FRANK CHALOUKKA (EDS), TOBACCO CONTROL IN DEVELOPING COUNTRIES 343

ⁱⁱ Jeff Collin, *et al.*, *The Framework Convention on Tobacco Control: The Politics of Global Health Governance*, in JOHN J. KIRTON (ED), THE LIBRARY OF ESSAYS IN GLOBAL GOVERNANCE: GLOBAL HEALTH 376 (2009).

ⁱⁱⁱ See Peter Muchlinski, *Trends in International Investment Agreement: Balancing Investor rights and the right to regulate*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 39 (2008-2009). Regulatory chill means causing states to be averse to taking regulatory measures due to risk of suit and fear of incurring corresponding costs.

^{iv} UNCTAD, Investor-State Disputes and Policy Implications, Note by the Secretariat. Trade and Development Board Commission on Investment, Technology and Related Financial Issue (2005) TD/B/COM.2/62, Geneva, at 7

^v Diaz, Jess, "Fraport sues Philippines Again Naia3 Philippine Star," 24 March 2011. Available at <http://www.abs-cbnnews.com/business/03/24/11/fraport-sue-philippines-again-naia-3-case>

^{vi} Tobacco Labelling Resource Centre: <http://www.tobaccolabels.ca/>

^{vii} Seri Begawan, Bandar, "MoH to address challenges to reduce smoking appeal," The Brunei Times, 11 Jan 2012. Available at <http://bit.ly/Az4wJY>; Ibrahim Diyana, Seri Begawan Bandar, "Brunei Mulls Plain Tobacco Packaging" 11 Jan 2012. Available at

<http://www.bt.com.bn/news-national/2012/01/11/brunei-mulls-plain-tobacco-packaging>

^{viii} UNCTAD Country list of BITs Available at

<http://www.unctad.org/templates/Page.asp?intItemID=2344&lang=1>

^{ix} WHO Framework Convention on Tobacco Control May 21, 2003, 42 ILM 518 (2003).

^x Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Multilateral Trade Agreements on Trade in Goods, T1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994)

^{xi} Guidelines for the Implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control, Recommendation 7. Available at http://www.who.int/fctc/guidelines/article_5.3.pdf

^{xii} Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IA, Multilateral Trade Agreements on Trade in Goods, 1868 U.N.T.S. 120, 122

^{xiii} WHO Framework Convention on Tobacco Control Conference of the Parties, International Negotiating Body, A Protocol on Illicit Trade of Tobacco Products, Draft Protocol to Eliminate Illicit Trade in Tobacco Products. FCTC/COP/INB-IT /4/7 (21 March 2010) (*Draft Protocol to Eliminate Illicit Trade in Tobacco Products*) art 8

^{xiv} *Id.*

^{xv} *Id.* art 9

^{xvi} *Id.* art 11